

NOV 20 1991

OFFICE OF THE CLERK

**In The
Supreme Court of the United States
October Term, 1991**

HOWARD WYATT,
Petitioner,
vs.

BILL COLE AND JOHN ROBBINS, II,
Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit**

JOINT APPENDIX

For Petitioner:

Jim Waide
(Counsel of Record)
Waide Law Office
Post Office Box 1357
Tupelo, MS 38802
601/842-7324

Douglas M. Magee
Attorney At Law
Post Office Box 155
Mendenhall, MS 39114
601/847-2446

For Respondents:

John M. Roach
(Counsel of Record)
Post Office Box 55951
Jackson, MS 39296-5951
601/362-7771

Mark C. Baker
Post Office Box 55951
Jackson, MS 39295-5951
601/362-7771

**Petition for Certiorari filed July 18, 1991
Certiorari granted October 7, 1991**

TABLE OF CONTENTS

A. Relevant Docket Entries of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit	1
B. Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi of April 13, 1989.....	3
C. Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi of August 10, 1989.....	10
D. Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi of January 8, 1990	20

The following opinion has been omitted in printing the Joint Appendix because it appears on the following pages of the Appendix to the Petition for Certiorari:

Opinion of Fifth Circuit Court of Appeals, pp. 13-37.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

A. UNITED STATES DISTRICT COURT:

June 24, 1987	Complaint
September 26, 1988	Plaintiff's Motion for Partial Summary Judgment.
October 3, 1988	Plaintiff's Second Amended Complaint.
April 13, 1989	Memorandum Opinion and Order: that partial summary judgment is granted.
Aug. 10, 1989	Memorandum Opinion and Order: It is Ordered that Pltf's motion for summary judgment is granted insofar as Bill Cole shall be liable for any damages which Pltf. can demonstrate in this cause; Further Ordered that Motion for Summary Judgment of Pltf. against Robbins is denied; Further Ordered that the Motion of Simpson County Defendants for summary judgment is granted and Simpson County, Magee, Jensen, Jones and Smith are dismissed; Further Ordered that all claims in this action against Roberts are dismissed; Further Ordered in all other respects, the Final Motion for Summary Judgment of the Pltf. is denied.

Sept. 15, 1989 Hearing or trial before United States
District Judge William Barbour, Jr.

Jan. 24, 1990 Plaintiff's Notice of Appeal to the Unit-
ed States Court of Appeals for the Fifth
Circuit.

B. UNITED STATES COURT OF APPEALS:

April 17, 1991 United States Court of Appeals for the
Fifth Circuit Opinion.

C. UNITED STATES SUPREME COURT:

July 16, 1991 Petition for Writ of Certiorari filed.

Oct. 7, 1991 Certiorari granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT,)	CIVIL ACTION
PLAINTIFF)	FILE NO.
VS.)	J87-0421(B)
BILL COLE, JOHN ROBBINS, II,)	
J. B. TORRENCE, RANKIN COUNTY,)	
MISSISSIPPI; LLOYD S. JONES;)	
WILEY MAGEE; CINDY JENSON;)	
ERNEST E. SMITH; SIMPSON COUNTY,)	
MISSISSIPPI RAY ROBERTS; AND)	
THE STATE OF MISSISSIPPI,)	
DEFENDANTS)	

MEMORANDUM OPINION AND ORDER

The Court has before it various motions to dismiss and for summary judgment submitted by the Plaintiff and Defendants. The Court reads the pending motions to dismiss as motions for summary judgment pursuant to Federal Rule of Civil Procedure 12 (b). The defenses and claims presented are each intertwined with the claim of the Plaintiff for a declaration that the replevin with bond statute of the State of Mississippi is unconstitutional. The Court has heard argument on the motions, reviewed the extensive pleadings, memoranda, affidavits and exhibits submitted by the parties, and finds no continuing question of material fact which might preclude partial summary judgment on this central question. As set forth below, this Court finds that the Mississippi replevin under bond statute, Section 11-37-101 of the Mississippi Code,

is contrary to the Constitution of the United States and therefore unenforceable.

I.

Howard Wyatt brings this action under 42 U.S. C. § 1983, 28 U.S.C. § 2201, and pendant state law provisions for abuse of process. His central claim arises from an unjustified replevin by a former partner, Bill Cole. On July 25, 1986, Bill Cole submitted a Complaint in Replevin to the Circuit Court of Simpson County, Mississippi, accompanied by a Plaintiff's Replevin Bond of \$18,000. A Writ of Replevin was then issued by Cindy Jensen, a deputy of Wiley Magee, Circuit Clerk of Simpson County. On July 28, Circuit Judge Jerry Yeager signed an Order directing the Circuit Clerk to issue a writ of replevin directed to the Sheriff of Simpson County, Mississippi. That writ was executed on July 29th and 30th by the Sheriff of Simpson County and others, who seized 24 head of cattle, a tractor and parts. The writ and a Summons were served on Wyatt on July 31, 1986. On October 3, 1986, Judge Yeager entered an Order dismissing the writ at the cost of the plaintiff, continuing the replevin bond in force, and ordering Cole to

immediately restore to the defendant the property taken from defendant pursuant to plaintiff's complaint in replevin and writ of replevin if said property is to be had, or, if said property is not to be had, to pay unto defendant the value thereof and any damages in this cause for the wrongful suing out of the writ of replevin by plaintiff as assessed upon writ of inquiry.

The action in the Circuit Court was dismissed without prejudice on September 3, 1988, although Cole had not com-

plied with the October 3, 1986, Order.

While a question exists as to the initial validity of the writ under the hand of a deputy court clerk without an order from a judge specified in the statute, the writ was not executed until a judge had ordered that such a writ be issued, and any defect in statutory procedure was then cured. It is uncontested that the writ was issued on a complaint as described in the statute, that the complaint was brought before a judge described in the statute, that the judge issued an order directing the issue of a writ, that the writ issued, that it was executed following judicial signal, and that Wyatt was deprived of property as a result.

II.

The Mississippi replevin under bond statute is set forth in Section 11-37-101 of the Mississippi Code. It provides that an action in replevin will be commenced:

If any person, his agent or attorney, shall file a declaration under oath setting forth:

- (a) A description of any personal property;
- (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
- (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
- (d) That the property is in the possession of the defendant; and
- (e) That the defendant wrongfully took and detains or wrongfully detains the same; and

shall present such pleadings to a judge of the supreme court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, such judge shall issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the declaration, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff...

(Emphasis supplied by the Court.) Miss. Code. Ann. § 11-37-101 (1988 Supp.) The judge is given discretion only to determine proper valuation of the property to be seized. See Miss. Code. Ann. § 11-37-103. The writ of replevin commands the sheriff or other lawful officer to immediately seize the property described in the writ and deliver it to the plaintiff and to summon the defendant to appear before the Court. Miss. Code. Ann. § 11-37-109. A trial of a replevin action may be had at any time following seizure or summons, so long as five days' process have been had upon the defendant. Miss. Code. Ann. § 11-37-125. If the defendant prevails, the plaintiff and his sureties are to restore any seized property or to pay the value of such property in damages for wrongful suit.

III

The Fourteenth Amendment of the Constitution of the United States provides, in part, that

No State shall...deprive any person of life, liberty or property, without due process of law...

U.S. Cons. Amend. 14, § 1. The Due Process Clause has been applied by the Supreme Court of the United States to prevent the taking of property both in replevin and by garnishment without sufficient process. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975). In both of these cases the Supreme Court held that statutes allowing seizures ordered by a court clerk without a hearing were unconstitutional. These cases did not prevent prejudgment seizures in every instance, and a Louisiana sequestration statute was upheld which allowed a creditor to obtain sequestration on order of a state court judge who was obligated to review the sufficiency of allegations in the petition for the writ prior to its issuance or denial. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). The Fifth Circuit Court of Appeals applied the *Fuentes* standard in *Turner v. Colonial Finance Corp.*, 467 F. 2d 202 (1972), striking down an earlier Mississippi replevin statute directing clerks of court to issue the writ. In *Johnson v. American Credit Company of Georgia*, 581 F. 2d 526 (5th Cir. 1978), the Fifth Circuit made clear that "due process requires that a prejudgment seizure be authorized by a judge who has discretion to deny issuance of the appropriate writ. *Johnson* 581 F. 2d at 534 (Emphasis supplied by this Court.)

The Mississippi replevin under bond statute provides no discretion to the judge to deny a writ of replevin on presentation of a complaint in the statutory form. By the terms of the statute, the judge "shall" grant whatever is presented. The required protections of judicial determination of the validity of the complaint, which are present in Mississippi's Claim and Delivery statutes, are absent. See Miss. Code. Ann. § 11-28-1, et seq. (1988 Supp.). This failing makes consideration of insufficient notice under the statute unnecessary.

On May 31, 1988, Judge Robert Mills of the Circuit Court

of George County declared "that the portion of the Miss. Code. Ann. § 11-37-101, et seq. (Supp. 1987) which provides for the pre-notice and pre-hearing seizure of property upon filing of the document specified therein and the posting of the specified bond is unconstitutional as it is a denial of due process of law...." The State of Mississippi, a Defendant in this case through its Attorney General, has likewise admitted the unconstitutionality of the statute.

The Court finds as a matter of law that Section 11-37-101 of the Mississippi Code, which states, "if any person...shall file a declaration....and shall present such pleadings to a judge...such judge shall issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration....", does not provide such safeguards of procedure as are required by the Due Process Clause of the Fourteenth Amendment. The Court therefore finds that the taking of property of the Plaintiff, pursuant to a writ issued under this statute, was a taking of property without due process of law.

IT IS THEREFORE ORDERED that partial summary judgment is granted to the Plaintiff insofar as his request for declaratory judgment that the Mississippi replevin under bond statute is unconstitutional shall be granted by separate judgment.

IT IS FURTHER ORDERED that the Plaintiff shall present a Final Motion for Summary Judgment and an accompanying memorandum, containing all claims which continue against each Defendant, the legal bases for each of these claims, a statement pertaining to each claim as to whether it is ripe for summary judgment or whether a continuing question of material fact exists, and a statement as to the amount and form of damages being sought from each Defendant. This

motion is to be filed no later than twenty (20) days following entry of this Order.

IT IS ALSO ORDERED that each Defendant may respond to this Motion of the Plaintiff and present memoranda containing any pertinent defenses within fifteen (15) days of the filing of the Motion by the Plaintiff. The Plaintiff shall thereafter have ten (10) days within which to file his rebuttals.

SO ORDERED this the 13th day of April, 1989.

lsl

William H. Barbour, Jr.

William H. Barbour, Jr.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT,)	CIVIL ACTION
Plaintiff)	FILE NO.
vs.)	J87-0421(B)
BILL COLE; JOHN ROBBINS II; J.B. TOR-)	
RENCE; RANKIN COUNTY, MISSISSIP-)	
PI; LLOYD S. JONES; WILEY MAGEE;)	
CINDY JENSEN; ERNEST E. SMITH;)	
SIMPSON COUNTY, MISSISSIPPI; RAY)	
ROBERTS; AND MIKE MOORE, as Attor-)	
ney General of the State of Mississippi,)	
Defendants)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Final Motion of the Plaintiff for Summary Judgment and on Motion for Summary Judgment by Simpson County, Mississippi, Lloyd Jones, Ernest Smith, Wiley Magee and Cindy Jensen ("Simpson County Defendants"), which Bill Cole and John Robbins II have joined. The Court has reviewed the pleadings and briefs submitted following its Memorandum Opinion and Order of April 13, 1989. Despite the style of the motion by the Plaintiff, certain issues have been reserved for trial, and the Court reads the motions presently before it as a motion for partial summary judgment on the issues of liability and a cross-motion for summary judgment. The Court reserves all questions concerning damages for trial. No genuine question of material fact continues as to the liability of the Defendants. The Court will grant the motion of the Plaintiff in part and deny it in part and

will grant the Motion of the Defendants, as set forth below.

I. Findings of Fact

The facts are set forth generally in the Memorandum Opinion and Order entered on April 13, 1989. *Wyatt v. Cole*, 710 F. Supp. 180, 181 (S.D. Miss. 1989). Defendant Bill Cole sought and obtained a Writ of Replevin with the assistance of his attorney, John Robbins II. The Writ was issued under Order of Judge Jerry Yeager of the Circuit Court of Simpson County, Mississippi, by Cindy Jensen, a deputy of Wiley Magee, the Simpson County Circuit Clerk. The Writ was served by Sheriff Lloyd Jones and Deputy Sheriff Ernest Smith of Simpson County, by Ray Roberts, a wrangler, and by others, who on July 29 and 30, 1986, seized cattle and equipment owned by the partnership composed of Cole and Plaintiff Wyatt. A hearing on a Writ of Inquiry following service of process led Judge Yeager to dismiss the replevin and order the return of the seized goods, which have not yet been returned.

This Court granted Wyatt a declaratory judgment that the Mississippi replevin under bond statute, set forth at Section 11-37-101 of the Mississippi Code, was unconstitutional because it does not give the judicial official ordering the issuance of a writ any discretion to deny a writ in replevin prior to seizure. Wyatt now seeks damages, jointly and severally from Bill Cole, John Robbins II, Sheriff Lloyd Jones, Deputy Sheriff Ernest Smith and Simpson County. The Plaintiff seeks relief from the State of Mississippi through its Attorney General only if Simpson County is not liable. No relief is sought from Rankin County, Mississippi, Cindy Jensen, Ray Roberts, or Alberta Cole. In light of directions to counsel in the Order of April 13, 1986, the Court finds all claims against named defendants in their individual capacities not pursued in the Final Motion to have been waived by the Plaintiff.

II. Conclusion of Law

The Court has found that the seizure of Wyatt's interests was a taking of property without due process of law. *Wyatt*, 710 F. Supp. at 183. The Court now determines liability for any damages which may have resulted from this deprivation. The Civil Rights Act of 1871 provides that

Every person who, under color of any statute...of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983.

A. Private Defendants

Wyatt seeks to hold Bill Cole, his former partner, and John Robbins, Cole's attorney, liable. A private citizen's use of a state-created scheme of attachment of private property is state action by that citizen which may be actionable under section 1983. *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). Section 1983 is a broad framework that admits to few privileges from liability, and the Court looks to the historical common law for those. *Tower v. Glover*, 467 U.S. 914, 920 (1984) (legal services attorney who conspired with state official liable under section 1983). Cole sought the acquisition of property under color of state law, and he acquired that property in derogation of Wyatt's right to due process prior to its loss. Although he retains the property in violation of an order of a state judge, this does not mean the deprivation was not under color of state law.

Cole seeks to hold John Robbins II liable for his acts as an attorney in requesting and executing the writ of replevin. There is no immunity which attaches by nature of service as an attorney. *Tower v. Glover* 467 U.S. 914, 920 (1984). While an action strictly within the scope of representation of a client does not normally constitute an act under color of state law, see *Russell v. Millsap*, 781 F.2d 381, 383 (5th Cir. 1985), an attorney is still a person who may conspire to act under color of state law in depriving another of secured rights. *Tower* 467 U.S. at 922. The distinction in federal law between conduct of client representation and conduct actionable under section 1983 is similar to the distinction of Mississippi law between privileged representation of counsel and actionable tortious conduct. See *Gold v. Labarre*, 455 So. 2d 739 (Miss. 1984), on appeal following remand, *Labarre v. Gold*, 520 So. 2d 1327 (Miss. 1987).

However, Cole and Robbins raise immunity to avoid liability. Private actors may be protected from liability for damages if they rely upon a presumptively valid attachment statute so long as the private actor neither knew nor should have known that the statute was unconstitutional. *Folsom Investment Company v. Moore*, 681 F.2d 1032 (5th Cir. 1982). This standard is identical to the *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), test for state officials performing discretionary functions. *Folsom*, 681 F.2d at 1932. The Defendants claim that they were entitled to rely upon the statutory enactment of the legislature. The Plaintiff claims that the infirmity should have been obvious. However, this dispute is not of material fact. The intent of the Fifth Circuit in creating the immunity is obviously to allow citizens the reasonable sanctuary of the law. The replevin statute was enacted following the invalidation of an earlier statute, and until the later statute was pronounced

to be unconstitutional, the individual defendants had a right to rely upon it.

However, this does not assure the availability of good faith immunity in this case. The property was seized as a result of state action by the private citizen. The continued possession of the property following judgment of the statute's unconstitutional system bars Cole from asserting good faith as a basis for immunity. Retention of property seized under a valid state statute is a continuing deprivation even after the state's basis for the seizure is abandoned. *Story v. United States*, 629 F. Supp. 1174 (N.D. Miss. 1986). The Court finds that Bill Cole acted under color of state law in depriving the Plaintiff of his property without due process of law and that his continued possession of the fruits of that deprivation following the time he should have known that the statute he had relied upon was unconstitutional, bars him from asserting a defense of good faith reliance. Summary judgment as to Cole's liability in the event any damages are proved will be granted to the Plaintiff.

The Court finds that there is a genuine issue of material fact as to whether John Robbins II performed any acts subsequent to the ruling of this Court declaring the statute unconstitutional which would subject him to liability. Summary judgment against Robbins is denied and this issue is held over for trial.

Ray Roberts is before this Court *pro se*. Although he has not moved for summary judgment, his defenses as an agent of the sheriff in seizing property under the writ are similar to those of the County Defendants below. The Court has found that the Plaintiff has waived his claim against Roberts and he will be dismissed.

B. County Defendants

The Second Amended Complaint seeks relief from Sheriff J.B. Torrence, Sheriff Lloyd Jones, Circuit Clerk Wiley Magee, Deputy Clerk Cindy Jensen, and Deputy Sheriff Ernest Smith, each in their official and individual capacities. The Memorandum Opinion and Order entered on April 13, 1989 ordered the Plaintiff to

present a Final Motion for Summary Judgment and an accompanying memorandum, containing all claims which continue against each Defendant, the legal bases for these claims, a statement pertaining to each claim as to whether it is ripe for summary judgment or whether a continuing question of material fact exists, and a statement as to the amount and form of damages being sought from each Defendant.

Wyatt, 710 F. Supp. at 183. The Final Motion for Summary Judgment was submitted to the Court, following an extension, on May 25, 1989. It stated claims against Simpson County, against "Private Defendants" Cole and Robbins and against "Sheriff Lloyd Jones and Deputy Sheriff Earnest Smith." The Simpson County Defendants moved for summary judgment on claims against Wiley Magee and Cindy Jensen. The Plaintiff responded by claiming that he had not abandoned his claim against them, but that "the court's ruling as to the sheriff's liability will be dispositive of the clerk and deputy clerk." The Court reads these pleadings in light of its instructions to counsel and finds that no relief is sought against the Simpson County defendants in their individual capacities, any such claims having been waived by the Plaintiff. In the event that a claim is meant to continue against these Defendants indivi-

dually, the Court notes that they are each entitled to immunity under *Folsom*, as discussed in part II.A, above.

The Court now addresses the liability against the individual Simpson County Defendants in their official capacities and against Simpson County, Mississippi ("the County"). The thrust of the Plaintiff's claim is that policy-making officials of the County caused the wrongful deprivation and the County is liable under section 1983 per *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and its progeny.

A county cannot avoid liability under section 1983 by claiming immunity under the Eleventh Amendment. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Mount Health City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). Neither may it assert good faith reliance of its officials on state law. *Owen v. Independence, Missouri*, 445 U.S. 622 (1980). The County has attempted to cloak its sheriff or itself in extended judicial immunity per *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980). While this theory would establish immunity over an individual clerk, such as Magee or Jensen, it does not reach to the governmental entity they represent. The County is therefore a "person" subject to suit under Section 1983 under the dictates of *Monell*.

Liability accrues to a county if it implements an unconstitutional policy or regulation adopted and promulgated by the county's officers. *Monell*, 436 U.S. at 690. The United States Court of Appeals for the Fifth Circuit has applied a bifurcated test to find such a policy if there is either a statement or regulation adopted by the county's lawmakers or a persistent widespread practice so common as to "constitute a custom which fairly represent municipal policy." *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984) (en banc).

The County is not liable if its officers act as agents of the state, directly carrying out state policy. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). This is distinct from a good faith defense, denied in *Owen* to a city whose officials unconstitutionally fired a police chief but did not act with malice. *Owen*, 445 U.S. at 629. The question is whether officials of the county acted for an autonomous entity subject to suit, or for a state sovereign immune from liability. Such immunity may be determined by the designation of the sovereign in creating the entity or in designating its tasks. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (bi-state agency not immune when both states that create it disclaim its immunity).

The acts of a county judge may be official policy of the county if his decisions may be fairly attributable to the county, as opposed to his sole discretion or to the state. *Crane v. State of Texas*, 759 F.2d 412 (5th Cir. 1985) citing *Familias Unidas*, 619 F.2d 391. The acts of a county sheriff or prosecutor may be official policy even if they are authorized under state law, so long there is discretion in the content of the policy to be exercised by the appropriate county officials. *Pembaur v. Cincinnati*, 475 U.S. at 482, 483.

There is no question that the judge and sheriff, and their assistants, were acting according to a state statute. There is also no question that the judge was directed by the statute to grant the writ. Miss Code Ann. § 11-37-101 (1972). The sheriff was obligated to serve it and seize the property. Miss Code Ann. § 11-37-109 (1972). The very basis of the declaratory relief granted to the Plaintiff was that state law gave no discretion to the judge to deny the writ or prevent the seizure. This same flaw forced the sheriff to seize the property. These acts are acts of the state, not of the county. There is no liability to

the county for acting as the statutes of its state require. To hold otherwise would effectively negate the operation of the Eleventh Amendment, whose operation in this sphere has recently been reaffirmed. *See Will v. Michigan Department of State Police*, No. 87-1207, slip op. decided (U.S. June 15, 1989).

C. The Attorney General

The Plaintiff pursues a claim against the Attorney General in his official capacity only as an alternative to a claim against Simpson County and its officers in their official capacities. In light of its ruling concerning the County, the Court notes that no liability under section 1983 may be assigned to this Defendant. State officers in their official capacities are not "persons" within the meaning of the Civil Rights Act of 1871. *Will v. Michigan Department of State Police*, No. 87-1207, slip op. decided (U.S. June 15, 1989). Unless sued for prospective injunctive relief, no remedy is available under 1983 against the state officer. *Will* at 12. The Attorney General has not waived immunity generally or in this cause. Therefore, no claim exists against Mike Moore in his capacity as Attorney General.

IT IS THEREFORE ORDERED that the Motion of the Plaintiff for Summary Judgment is granted insofar as Bill Cole shall be liable for any damages which the Plaintiff can demonstrate in this cause.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of Plaintiff against John Robbins II is denied.

IT IS FURTHER ORDERED that the Motion of the Simpson County Defendants for Summary Judgment is granted, and that Simpson County, Wiley Magee, Cindy Jensen, Lloyd Jones, and Ernest Smith are dismissed from this cause.

IT IS FURTHER ORDERED that all claims in this action against Ray Roberts are dismissed.

IT IS FURTHER ORDERED that in all other respects, the Final Motion for Summary Judgment of the Plaintiff is denied.
SO ORDERED this the 10th day of August, 1989.

lsl

William H. Barbour, Jr.
William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOWARD L. WYATT
vs.
BILL COLE, et. al.

CIVIL ACTION
FILE NO.
J87-0421(B)

MEMORANDUM OPINION AND ORDER

This cause is before the Court on Motions by Plaintiff and several of the Defendants for Attorney's Fees. Having considered the Motions and supporting and opposing documents, the Court finds that the Plaintiff should be awarded attorney's fees against the State of Mississippi for the period beginning with the initiation of the litigation and ending with the entry of an Order by this Court declaring the replevin statute at issue to be unconstitutional and also for the period covering the parties' litigation of the attorney's fees issue. The Court also finds that no attorney's fees should be awarded to any of the Defendants.

I. FACTUAL BACKGROUND

Plaintiff filed the instant action in this court in July 1987 pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 2201. Plaintiff alleged violation of his constitutional rights through the deprivation of property by Defendants pursuant to a writ of replevin under the Mississippi replevin statute and pendent state law claims for abuse of process. On September 14, 1987, the State of Mississippi filed a Motion to Intervene which the Court granted on February 29, 1988. On April 4, 1988, the Court allowed the State to appear as Amicus Curiae rather than as an intervening party, and on April 18, 1988, Plaintiff amended

its Complaint by leave of the Court to add the State as a Defendant. On September 19, 1988, Attorney General Mike Moore in his official capacity was substituted for the State as a Defendant.

On April 13, 1989, the Court granted Plaintiff a declaratory judgment that the Mississippi replevin under bond statute, Miss. Code Ann. § 11-37-101 (Supp. 1989), was unconstitutional because it did not give the judicial official ordering the issuance of a writ any discretion to deny a writ in replevin prior to seizure. On August 10, 1989, this Court issued an opinion granting summary judgment for Plaintiff against Defendant Bill Cole insofar as Cole would be liable for any damages which Plaintiff could demonstrate at trial, denying summary judgment for Plaintiff against Defendant John Robbins II, and dismissing all claims of Plaintiff against Defendants Simpson County, Wiley Magee, Cindy Jensen, Lloyd Jones, Ernest Smith, and Ray Roberts.

The case was set for trial beginning on August 22, 1989. On that date the Court dismissed Defendant Robbins from the case upon the statement of Plaintiff's counsel that they could prove no act of Robbins occurring after the Court declared the replevin statute unconstitutional. Counsel for Plaintiff also revealed that they could not prove actual damages by Cole accruing after the declaration of unconstitutionality. The Court retained jurisdiction to consider motions for Attorney's fees.

On September 22, 1989, Plaintiff filed his Motion for Attorney's Fees seeking nominal damages and/or attorney's fees from Defendant Attorney General Mike Moore in his official capacity, Defendant Cole, Defendant Robbins, Defendant Simpson County, and Defendants Sheriff Lloyd Jones and Circuit Clerk Wiley Magee of Simpson County in their individual

capacities.

On October 4, 1989, Defendants Jones, Magee, Cindy Jensen, Ernest E. Smith, and Simpson County filed a Motion for Attorney's Fees against Plaintiff. Defendants Cole and Robbins have also requested assessment of attorney's fees and costs against Plaintiff in responding to Plaintiff's Motion.

II. CONCLUSIONS OF LAW

Congress has made explicit provision for the award of attorney's fees in certain civil rights cases in the Civil Rights Attorney's Fees Awards Act of 1976, which states in relevant part as follows:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988. As the legislative history of the statute indicates and as the United States Supreme Court has recognized, this statute grants broad authority to the courts to award attorney's fees to plaintiffs in civil rights cases. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984) (citing *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); *Hutto v. Finney*, 437 U.S. 678, 694 (1978); and S. Rep. No. 94-1011, p. 4 (1976)). Indeed a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In this case Plaintiff has prevailed on the central issue of the unconstitutionality of the Mississippi replevin statute and is thus entitled to attorney's fees. The Court must next determine, then, from whom Plaintiff should

recover and how much.

A. From Whom Should Plaintiff Recover?

Plaintiff seeks an award of attorney's fees against Defendants Sheriff Lloyd Jones and Circuit Clerk Wiley Magee of Simpson County in their individual capacities, Simpson County, John Robbins, Bill Cole, and Attorney General Mike Moore.

1. The Simpson County Defendants

Since the Court noted in its August 10 opinion that relief was sought against certain officials of Simpson County in their official capacities and not in their individual capacities, *Wyatt v. Cole et al.*, No. J87-0421(B), slip op. at 7 (S.D. Miss. Aug. 10, 1989), there can be no liability for attorney's fees by the county officials in their individual capacities. The Court also found on August 10 that the acts of the Simpson County officials were "acts of the state, not of the county" and that "[t]here is no liability to the county for acting as the statutes of the state require." *Id.* at 10. Therefore, since there is no substantive liability on the part of Simpson County itself, it cannot be held liable for attorney's fees. *See Familias Unidas v. Briscoe*, 619 F. 2d 391, 406 (5th Cir. 1980) (where county had been found not susceptible to suit under 1983 in that county official, in implementing statute later found to be unconstitutional, had merely been effectuating state policy embodied in statute, county held not liable for attorney's fees). Furthermore, since the acts of the Simpson County officials were essentially acts of the State of Mississippi, any award of attorney's fees against those officials in their official capacities is in effect an award against the State. *See id.* (because acts of county officials in implementing state policy were deemed to be acts of state, and because award of attorney's fees under section 1988 against person in official capacity is treated as

award against governmental body of which person is representative, state and not county held liable for attorney's fees). The Court finds that the Simpson County officials against whom Plaintiff seeks an award of fees, Sheriff Jones and Circuit Clerk Magee, are liable for attorney's fees in their official capacities, thus rendering the State of Mississippi liable for attorney's fees on their behalf.¹ Accordingly, neither Simpson County nor any officer of the County bear responsibility for the payment of any attorney's fees.

2. Defendants Robbins and Cole

As the court found in its August 10 opinion, summary judgment could not be entered as to whether Robbins, who is Defendant Cole's attorney, had performed any acts subsequent to the declaration of the Court that the replevin statute was unconstitutional which would subject him to liability. The issue was thus reserved for trial. However, as noted supra Plaintiff's counsel admitted on the initial day of trial that they could prove no act of Robbins after the declaration of unconstitutionality. Therefore, since the Court also found on August 10 that the individual defendants, including Robbins, had a right to rely upon the replevin statute until it was pronounced unconstitutional and that such right constituted good faith immunity, Robbins cannot be held liable for attorney's fees. See *Familias Unidas*, 619 F. 2d at 406 (same good faith immunity insulating individual defendants from personal liability for

¹As explained infra, the award of attorney's fees granted against the State of Mississippi does not imply that the State is liable for damages, either nominal or otherwise. In fact, the State is immune from damages under the Eleventh Amendment. Nonetheless, like the State of Texas in *Familias Unidas*, the State of Mississippi, though immune from actual damages, is liable for attorney's fees.

damages also forecloses personal liability for plaintiff's attorney's fees).

For a similar reason, Defendant Cole must be held free from liability for attorney's fees. Concerning Cole, the Court found on August 10 that he had "acted under color of state law in depriving the Plaintiff of his property without due process of law and that his continued possession of the fruits of that deprivation following the time he should have known that the statute he had relied upon was unconstitutional, bars him from asserting a defense of good faith reliance." *Wyatt*, slip op. at 5-6. However, Plaintiff was unable at trial to prove any damages caused by Cole following the Court's pronouncement of unconstitutionality. Thus, because Plaintiff did not prevail against Cole on the damages issue and because Cole was entitled to the shield of good faith immunity before that pronouncement, Cole is free from liability for attorney's fees.

SO ORDERED this the 8th day of January, 1990.

lsl

William H. Barbour, Jr.
William H. Barbour, Jr.
United States District Judge